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JAN 13 1958
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957

No. 670

MILLS MILL, DRAPER CORPORATION AND THE POWELL KNITTING COMPANY, INDIVIDUALLY AND ON BEHALF OF ALL OF THE TAXPAYERS IN UNA WATER DISTRICT WHO MAY CARE TO COME IN, CONTRIBUTE TO THE COSTS HEREOF AND PARTICIPATE IN THIS ACTION, APPELLANTS,

versus

ERNEST E. HAWKINS, B. R. WEST AND J. T. NORTON, INDIVIDUALLY AND CONSTITUTING THE UNA WATER DISTRICT COMMISSION, APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

MOTION TO DISMISS OR AFFIRM

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STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Come now appellees and file their statement in opposition to appellants' appeal on the ground that it does not present a substantial federal question, and hereby move the Court to dismiss the appeal herein or affirm the decision and judgment of the Supreme Court of the State of South Carolina, from which decision and judgment said appeal is taken.

APPELLANTS WERE ACCORDED DUE PROCESS AND EQUAL PROTECTION OF THE LAWS

The statute enacted by the General Assembly of South Carolina about which the appellants complain is only one of many enacted during the past several years. All of them contain substantially the same provisions, and they have afforded a means of considerable growth to hitherto barren areas in South Carolina in that water, sewerage and garbage collection are obtainable. An adverse ruling by this Court therefor will have far reaching implications and will impede the health and standard of living of thousands of unfortunate South Carolinians.

The appellants in the State Courts advanced two grounds for attacking the validity of the legislation. First, they contended it was special legislation contravening the State Constitution, and secondly, that it deprived them of their property without due process of law and denies them the equal protection of the laws. Apparently, from a perusal of the statement of the case, they would like to advance both grounds here for it contains much surplusage about a general law. The only question here is whether or not the applicable Federal law has been adhered to by the State Court. That the applicable Federal law was applied to the facts in this case is apparent by reading the Circuit Court's opinion as appears on page 59 of the appellants' Jurisdictional Statement. There the Court cites the case of *Valley Farms Company v. Westchester County*, 261 U. S. 155, 43 S. Ct. 261, 67 L. Ed. 585, a case *a propos*, and one which adheres to the doctrine set forth in *Houck v. Little River Drainage Dist.*, 239 U. S. 254, 60 L. Ed. 266, 36 S. Ct. 58. In the majority opinion by the South Carolina Supreme Court (Jurisdictional Statement, pg. 26) several United States Supreme Court cases are cited to sustain the view that the statute is not violative of the due process and equal protec-

tion clauses of the Constitution. Those cases are *Branson v. Bush*, 251 U. S. 182, 40 S. Ct. 113; *Valley Farms Co. v. County of Westchester*, 261 U. S. 155, 43 S. Ct. 261, 67 L. Ed. 585; *Houck v. Little River Drainage District*, 239 U. S. 254, 36 S. Ct. 58, 60 L. Ed. 266 and *Kansas City Southern Ry. Co. v. Road Imp. Dist. No. 3*, 266 U. S. 379, 45 S. Ct. 136. On the other hand, it is worthy to note that the dissenting opinion and appellants cite cases in support of their position which were decided before the *Valley Farms Co. case, supra*, and which were distinguished in that case.

The doctrine set out in the case of *Myles Salt Co. v. Iberia & St. M. Drainage Dist.*, 239 U. S. 478, 36 S. Ct. 204, 60 L. Ed. 392 appears to be sound law but it has no application in the instant case because of the factual differences. Realizing that the State Court was conversant with the applicable Federal law, did they apply it correctly to the facts in this case?

The appellants complain that their area was arbitrarily included by the legislature. This complaint was ably refuted in the State Court's opinion (Jurisdictional Statement, pg. 26):

> "Adjoining the Una District are the City of Spartanburg and several water and sewer subdistricts. It is probable that the Legislature was undertaking to provide a general and comprehensive water and sewerage system for those areas which had developed around the City of Spartanburg and in doing so found it was not practicable to exclude appellants' lands and other small portions now served by these facilities. But be that as it may, we cannot say that the fixing of the boundaries of the Una Water District was a flagrant abuse of legislative discretion."

It is not necessary that a property owner have notice and opportunity to be heard before fixing the boundaries of a district so as to include his lands and prescribing the

method of tax. *Valley Farms Co. v. Westchester County, supra.*

Before the bonds could be issued under the Act a majority of the district residents had to vote thereby acquiescing in the burden of taxation. They have voted overwhelmingly to issue the bonds. Nothing has been forced upon the residents. The appellants are corporate entities and none of their executives reside in the area. None of them appeared as witnesses in behalf of their case and while they purported to show the assessed valuation of the property in the district of Duke Power Co., Southern Bell Telephone & Telegraph Company, A. & S. Railroad, A. & CAL Railroad and P. & N. Railroad, none of these companies joined in the cause at all. Appellants contend that they will be required to pay 37.4 per cent. of the tax levied to retire the bonds without any benefits, direct or indirect. They contend that they have water and sewer systems in operation adequately serving them and their communities. They forget that the sewer system, such as it is, that is now used by them has been made possible by the land owners in the district paying a six mill levy on their property since the year 1929, without they themselves being able to use the same. The residents fortunate enough to have use of water in the communities of the appellants are at the mercy of them in that they purchase the water through a master meter and can terminate the flow thereof at will and can likewise charge whatever rates they desire. Most water lines running through the district are privately owned and permission of the owner must be obtained to tap on. Water pressure in the lines that are in the district is inadequate with the result that not many residences have the use of water continuously. This creates hazardous conditions for fires. The water lines in and around the appellants are old and if normal pressure were applied to them, many would have to be replaced. The installation of water and sewerage

in the district generally would result in less disease among the employees of appellants. Their property would enhance in value. Fire insurance rates would be less. More industry and residents would come in with the tax load diminished on all property owners in the district. Finally, the appellants have, since this proceeding commenced, relieved themselves of part of their tax burden by selling the community mill houses to their employees with the result that the individual home owners are paying more taxes because their homes are assessed at a greater value than when the appellants returned them in bulk. To refute appellants' contention that they are adequately served, their witness, Superintendent Simms of the Spartanburg Water Works, testified that there is not ample water out there to supply the whole area through which it goes.

In the case of *Valley Farms Co. v. Westchester County, supra*, the Court brushed aside the same contentions made by appellants here as follows:

> "Since *Houck v. Little River Drainage Dist.* (1915), 239 U. S. 254, 60 L. Ed. 266, 36 S. Ct. 58, the doctrine has been definitely settled that, in the absence of flagrant abuse or purely arbitrary action, a state may establish drainage districts and tax lands therein for local improvements and that none of such lands may escape liability solely because they will not receive direct benefits.
>
> "*Myles Salt Co. v. Iberia & St. M. Drainage Dist.*; *Gast Realty & Investment Co. v. Schneider Granite Co.*; and *Kansas City Southern R. Co. v. Road Improvement Dist., supra*, present facts deemed sufficient to show action 'palpably arbitrary, and a plain abuse' of power. Here the allegations make out no such situation. All lands within the district ultimately may be connected with some portion of the sewer, and we cannot say they derive no benefits therefrom, or that any were included arbitrarily, or for improper purposes".

Browning v. Hooper, 269 U. S. 396, 405, 46 S. Ct. 141, 70 L. Ed. 330 holds that:

> "where a local improvement territory is selected, and the burden is spread by the legislature or by a municipality to which the State has granted full legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefits. *Valley Farms Co. v. Westchester, supra; Hancock v. Muskogee*, 250 U. S. 454, 459; *Withnell v. Construction Co.*, 249 U. S. 63, 69; *Wright v. Poliee Jury*, 264 Fed. 705."

The case of *Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission of California et al.* (1953), 346 U. S. 346 involved a state statute whereby the railway company was required to pay 50% of the costs in making certain grade separation improvements. To the railroad contention that the costs should be allocated on the basis of benefits to the railroads this Court held that there was nothing arbitrary or unreasonable and no deprivation of the property of the railroads without due process of law; that the railroads were not entitled to have the costs of the improvements allocated only on the basis of benefits which will accrue to their property. This Court distinguished the case of *Nashville C. & St. L. R. Co. v. Walters*, 294 U. S. 405, 79 L. Ed. 949 advanced by appellants in support of their position here from the *Atchison case, supra*, in that the *Nashville case* involved improvements to meet local transportation needs and further safety and convenience, whereas this case involves improvements whose purpose and end result is to enhance the value of the property involved by reason of the added facilities.

In the case of *Memphis & Charleston Railway Company v. Pace et al.*, 282 U. S. 241, 51 S. Ct. 108, 75 L. Ed. 315 the State of Mississippi imposed a road tax for road improvement and the railroad having part of its line and

other property within the road district contended the act was invalid as authorizing the imposition of a tax which was so palpably arbitrary and unreasonably discriminatory that it offended the due process and equal protection clauses of the Fourteenth Amendment. The appellant contended that the tax was not apportioned according to benefits but was laid upon all the property, real and personal, within the district on an *ad valorem* basis; that its personal property would receive no benefits and that even if there be some benefit to the appellant's property, the tax laid thereon is disproportionate to the benefit and to the tax laid on other property. The Court in sustaining the tax held:

> "Whether the tax shall be state wide or confined to the county or local district wherein the improvement is made, and whether it shall be laid generally on all property or all real property within the taxing unit, or shall be laid only on real property specially benefited, are matters which rest in the discretion of the State, and are not controlled by either the due process or the equal protection clause of the Fourteenth Amendment. *County of Mobile v. Kimball*, 102 U. S. 691, 703; *Spencer v. Merchant*, 125 U. S. 345, 355-356; *Houck v. Little River District*, 239 U. S. 254, 262, 265; *Valley Farms Co. v. Westchester*, 261 U. S. 155; *Missouri Pacific R. R. Co. v. Crawford Road District, supra; Kansas City Southern Ry. Co. v. Road Improvement District No. 3*, 266 U. S. 379, 386.
>
> "But, however the tax may be laid, if it be palpably arbitrary, and therefore a plain abuse of power, it falls within the condemnation of the due process clause, *Houck v. Little River District, supra; Valley Farms Co. v. Westchester, supra;* and if it be manifestly and unreasonably discriminatory it falls within the condemnation of the equal protection clause. *Gast Realty Co. v. Schneider Granite Co.*, 240 U. S. 55; *Kansas City Southern Ry. Co. v. Road Improvement District No. 6*, 256 U. S. 658; *Thomas v. Kansas City Southern Ry. Co.*, 261 U. S. 481; *Road Improvement District No. 1 v. Missouri Pacific R. R. Co.*, 274 U. S. 188.

> "Where the tax is laid generally on all property or all real property within the taxing unit, it does not become arbitrary or discriminatory merely because it is spread over such property on an *ad valorem* basis; nor where the tax is thus general and *ad valorem* does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community. *St. Louis & Southwestern Ry. Co. v. Nattin*, 277 U. S. 157; *Valley Farms Co. v. Westchester, supra; Houck v. Little River District, supra; Miller & Lux v. Sacramento Drainage District*, 256 U. S. 129; *Missouri & Pacific R. R. Co. v. Crawford Road District, supra.*"

This is not a case where the appellants have been denied the right to present their case to the court. It was heard in the lower State Court before a jurist who is a life-long resident of the County in which the Una District is situated and who heard the witnesses examined and cross examined, and who is personally familiar with the conditions existing within the district and the surrounding territory. In his opinion he wrote (Jurisdictional Statement pg. 62):

> "It is contended by the plaintiffs that the burden of taxes falling upon them will be confiscatorily excessive, depriving them of property without due process of law. It is obvious, of course, that they will pay substantially. However, the Court is of the opinion that the plaintiffs have not by the preponderance of the evidence, established that the payments will be in such proportion that the Court should intervene. It is a legislative matter and this Court concludes that the plaintiffs have not carried the burden of proof on this point".

This finding by the Court was inescapable as the appellants' only evidence was one inexperienced witness with a bare mathematical calculation based on 1950 property value assessments. The witness did not take into consideration the increased value of assessments which would naturally result if and when adequate water and sewerage

facilities made the vacant land in the district available for industrial expansion; that the revenue to be received from the sale of the water was not considered; and the increased assessed valuation of the houses as a result of the mills selling them to their employees.

There is evidence from one of appellants' principal witnesses (Mr. R. B. Simms, Superintendent of the Water Works) that he had never known of a District or section which had water and sewerage installed therein which did not rise in property valuations. It is a matter of common knowledge that vacant or slum areas without water and sewerage facilities sell by the acre and that the same property as to which streets, sewerage and water are provided will sell by the front foot. It is conceivable that the vacant or slum property in the Una Water District, being situated as it is, bounded on one side by the City of Spartanburg; on another side by the main line of the Southern Railroad from Washington to Atlanta; and on another side by the most heavily travelled U. S. Highway in South Carolina, might develop and enhance in value to such an extent that the taxes produced on the new assessed valuation would in time be lower with the proposed water and sewerage bond issue than they now are without it.

The majority view of the South Carolina Supreme Court, consisting of three eminent Justices who have lived in South Carolina their entire lives; who come from the upper part of South Carolina where industrial rather than agricultural conditions are predominant and who know and understand the need for improving living conditions in an area where this particular portion of South Carolina is growing and becoming more industrialized more rapidly than at any time in history, affirmed in their Opinion the Opinion of the lower Court, and ratified the action of the Legislature of South Carolina, who passed the Act and the overwhelming majority of the people in the Una Water

District who voted for the bond issue in question. Their decision should be allowed to stand.

The minority decision of the Court devotes only about two pages to the confiscatory phase of the question. It indicates a lack of knowledge as to the factual evidence in the record as to the confiscatory phase of the question. This brief and incidental holding should not be a basis for this Court taking jurisdiction of a matter (primarily factual in its nature) which has been thoroughly considered over a period of years by the Legislature of South Carolina, a vote of the people in the District involved, a local Resident Judge and a majority of the Justices of the South Carolina Supreme Court.

For the aforesaid reasons it is obvious that the contentions by appellants that the opinion of the Supreme Court of South Carolina is in direct conflict with the holdings of this Court in the case of *Myles Salt Co. v. Board of Commissioners, supra,* is completely without substance and the face of the record reflects that fact. It is equally apparent that the Constitutional guarantees of due process and equal protection have not been violated by this Act and the face of the record reflects that fact. Therefore, no substantial federal question is presented on any issue. This case is one where there has been no doubt about the applicable Federal law from its beginning and the State Courts have scrupulously adhered to it in applying it to the facts of the case.

THE APPEAL HEREIN IS WITHOUT MERIT, THERE BEING NO SUBSTANTIAL FEDERAL QUESTION INVOLVED

Appellees contend that the record in this case discloses no substantial federal question and, therefore, this Court is without jurisdiction of this cause. It is therefore submitted that appellees' motion herein to dismiss the appeal or affirm the judgment of the Supreme Court of South Carolina should be granted.

Wherefore, appellees pray that this Court refuse to note jurisdiction in this cause and that appellees' motion to dismiss the appeal or affirm the judgment be granted.

Respectfully submitted,

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